Supreme Court, U. S.
FILED
AUG 1 1978
MICHAEL RODAK, JR., CLERK

78-641

IN THE

SUPREME COURT OF THE UNITED STATES

D. ALWYN STIVERS & WALTER B. CHERRY,
Petitioners

vs.

STATE OF MINNESOTA, MINNESOTA STATE BAR ASSOCIATION, HENNEPIN COUNTY DISTRICT COURT, JUDGE STANLEY D. KANE, GARY FLAKNE, AS HENNEPIN COUNTY ATTORNEY AND WARREN SPANNAUS AS STATES ATTORNEY GENERAL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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October 9, 1978

INDEX

	Page
GROUNDS	2
Nature of proceedings	2
Statute being attacked	2
Pertinent dates	3
Act of Congress which confers jurisdiction ..	3
QUESTION PRESENTED	3
AUTHORITIES INVOLVED IN THIS CASE	4
STATEMENT OF CASE	4
Concise statement of facts ...	4
Basis for federal jurisdiction	8
ARGUMENT FOR ALLOWANCE OF WRIT ..	8
CONCLUSION	13
INDEX TO APPENDIX	15
JUDGMENT OF U.S. DISTRICT COURT .	1a
APPENDED PORTION SOUGHT TO BE REVIEWED	2a

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

I.

GROUNDS

1.1 The nature of the proceedings

This is a civil rights action for an injunction and declaratory judgement against the harassment under color of law, the enforcement - by state officials and their agents - of the Minnesota Statute purporting to regulate the unauthorized practice of law within the state by actions, including actions brought by private legal organizations, causing such chilling effect as to deprive petitioners of their rights, privileges, immunities and protections afforded by the United States Constitution and its progeny.

1.2 The statute being attacked

Petitioners claim that Minnesota State Statute 481.02, Unauthorized Practice of Law, is unconstitutional as applied to

their activities.

1.3 Pertinent dates relative to this petition

This is an appeal from an order of the United States Court of Appeals, for the Eighth Circuit, No. 77-1564, filed on May 3, 1978, denying peitioners' request for remand to a three-judge federal court.

1.4 Act of Congress which confers jurisdiction on the Supreme Court

Jurisdiction of the U. S. Supreme Court is invoked under 28 U.S.C.A. 1254 which reads as follows: " Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree".

II.

QUESTION PRESENTED

Whether it was error for the three-

judge court to include the herein petitioners in total dismissal of the lower court action prior to trial and for the United States Court of Appeals, for the Eighth Circuit, to decline to remand this case to the three-judge court with directions to hear petitioners' constitutional claim.

III.

AUTHORITIES INVOLVED IN THIS CASE

The natural rights and privileges of petitioners Stivers and Cherry have been abridged by the refusal of the federal judiciary to hear their grievances; such refusal constitutes summary deprivation of the protection of the 1st, 6th, 9th, and 14th amendments to the United States Constitution.

IV.

STATEMENT OF THE CASE

4.1 Concise statement of facts

Petitioners Cherry and Stivers are

members of Divorce Education Association, an association of people who gather together for the purpose of sharing information and ideas of teaching eachother the rudiments of process and procedures of the court functions. In addition, the Association provides a forum within which members can espouse their beliefs and ideas about the divorce system and a place to work together to effect legislative changes relating to the matter of divorce.

In March 1974, the Minnesota State Bar Association (MSBA) commenced a civil suit in the Hennepin County District Court of Minnesota against Charles T. Thibodeau, Donna Thibodeau and Divorce Education Associates, INC., a defunct non-profit corporation (and different from the above " Association"), charging the unauthorized practice of law.

In February 1975, the MSBA attempted

to amend its action against the Thibodeaus by adding as defendant, Divorce Education Association, an unincorporated non-profit association, in which the Thibodeaus, Stivers, and Cherry are members. The Bar Association's attempt to amend was denied.

In April 1975, the MSBA initiated a new law suit against Divorce Education Association. Again this attempt to involve Divorce Education Association and its members, including petitioners Stivers and Cherry failed in dismissal without prejudice of the suit. Hence, the state court left the door open for future suits against Stivers and Cherry.

Petitioners Stivers and Cherry joined the Thibodeaus in commencing this suit in October 1975 prior to the state court trial, which commenced January 5, 1976. Petitioners requested the state court proceedings be enjoined and that a three-judge court be empaneled to hear their

federal question.

On December 10, 1975, the federal court injunction was denied by Judge McManus and a three-judge court was empaneled.

The state court proceedings came to judgement on the single issue of whether or not the Thibodeaus' activities within Divorce Education constituted the practice of law; deciding that the activities were the practice of law and that they violated the pertinent Minnesota Statute.

As a consequence of this, Divorce Education Association elected to suspend its operations pending determination of the herein issues to preclude sacrificing any more members to the state official police powers. Members are afraid to exercise their desire to assemble and carry on their mutually beneficial association.

On May 11, 1977, Thibodeaus' appeal to the Minnesota Supreme Court was dismissed

for lack of prosecution.

4.2 Basis for federal jurisdiction in the court of first instance

(a) Jurisdiction is conferred by Act of Congress, 28 U.S.C. Sect. 1331, 28 U.S.C. Sect. 1343, and damages are authorized by 42 U.S.C. Sect. 1983, and the Declaratory Judgement Act, 28 U.S.C. Sect. 2201 .

(b) Temporary restraining orders and preliminary injunctions are authorized by Rule 65, Federal Rules of Civil Procedure, 28 U.S.C. Sect. 2283, and 28 U.S.C. Sect. 2284 (3) .

V.

ARGUMENT FOR ALLOWANCE OF WRIT

Functionally speaking, it was wrong for the court below to dismiss the good-faith and meritorious petition for the redress of grievances. Petitioners Cherry and Stivers' perception of the meaning of the lower courts'

determinations that the prevailing circumstances preclude their cause from being accorded a hearing by the three-judge federal district court are characterized by this dialogue:

1. Thibodeau is sued in state court.

2. Plaintiff (the Minnesota State Bar Association) said to state court: Cherry and all others who are members of Divorce Education Association are engaged in the same activity and we charge them accordingly asking that the Association (Cherry, Stivers, et al) be included as defendants in this state proceeding.

3. State Court to MSBA: I will not accept as co-defendants in this law suit any of the other members of Divorce Education Association.

4. Cherry to State Court: I will not volunteer to be prosecuted at the state level regarding the legality of my activities as a member of DEA.

5. State Court to Cherry: Your activity in DEA will not be adjudicated at this time by this court.

6. Federal Court to Cherry: Your co-worker Thibodeau has been sued in State Court. As a fellow-member of his in DEA and engaged in the same activity you must await the consummation of those proceedings before we will entertain your constitutional claims.

7. Cherry to Federal Court: I prefer to have the constitutionality of my DEA activities determined by the Federal Court. In addition, I was excluded by the State Court in becoming a co-defendant in the activities for which my co-member Thibodeau was being prosecuted in the State Court prior to my filing suit in Federal Court.

8. Federal Court to Cherry: Thibodeau will nevertheless have to exhaust his State Court remedies before we will hear

your constitutional claims.

9. Cherry to Federal Court: Thibodeau's remedies have been exhausted. The State Supreme Court has dismissed his appeal.

10. Federal Court to Cherry: Thibodeau's remedies at the State Level were not exhausted due to his failure to prosecute.

11. Cherry to Federal Court: I have no deficiencies to be remedied before the State Court, therefore I am entitled to be heard in Federal Court regarding the constitutionality of my activities in DEA.

12. Federal Court to Cherry: You are not entitled to be heard in Fedral Court regarding the constitutionality of your activities in DEA because Thibodeau failed to exhaust his remedies in the State Court.

Petitioners Cherry and Stivers do not believe that the law of the land endorses court procedures that get a person into a corner like that with respect to his

rightful access to the Federal Courts.

Petitioners believe also that there is yet an attendant issue of exceedingly great scope, which opens to this Court the opportunity to have the Federal Courts manifest an official concern for the securing of the constitutionally protected rights of the members of divorced or divorcing families to assemble together amd to assist one another in securing those rights.

Petitioners Stivers and Cherry believe that the activities they engaged in as members of Divorce Education Association, including their mutual relationship to the paid members Thibodeaus (whose law suit in defense against the Minnesota State Bar Association is referenced throughout this file) are entitled to Constitutional protection.

In the light of the traditional role of the respondents in the lives of

divorced families in Minnesota and of the extensive material of the petitioners on on file herein that is related to the origins and purpose of Divorce Education Association, there exists --- petitioners believe --- a natural conflict which mitigates against petitioners being judged by any of the respondents or their associates at the state level within the context of a legal determination.

Petitioners reiterate their continued belief that the threat of the application of Minnesota Statute 481.02 as applied to their activities by the respondents in this law suit mandates a federal determination as to their legality.

VI.

CONCLUSION

Wherefore, petitioners Cherry and Stivers

--- believe that the lower court has erred in its application of the cases cited

as reasons for not remanding to the three-judge court,

—— and that this error concerning the principles of federalism and comity becomes a practical threat to the stability of family life in Minnesota,

—— and they urge upon the Court the remanding of this case, that this cause on behalf of family life in America be neither lost in the corridors of case history nor sacrificed to the decadence in camaraderie.

Dated, St. Paul, Minnesota,

October 9, 1978

Respectfully submitted,

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APPENDIX

JUDGEMENT OF U.S. DISTRICT COURT 1a

APPENDED PORTION SOUGHT TO BE REVIEWED 2a

Order No. 77-1564 of the United States Court of Appeals, for the Eighth Circuit, filed on May 3, 1978 .

UNITED STATES DISTRICT COURT
for the
District of Minnesota- Fourth Division

Civil Action File No. 4-75-550

Charles T. Thibodeau, et al

vs. JUDGMENT

State of Minnesota, et al

This action came before the Court, Honorable Edward J. McManus, Roy L. Stephenson and Myron H. Bright, United States District Judge.

It is Ordered and Adjudged that judgment of dismissal is hereby entered.

Dated at Minneapolis, MN., this 30th day of March, 1977 .

Harry A. Sieben,
Clerk of Court

Cynthia Bentzen, Deputy

United States Court of Appeals

for the Eighth Circuit

No. 77-1564

D. Alwyn Stivers and
Walter B. Cherry,

Appellants

v.

State of Minnesota; Minnesota State Bar Association, a Minnesota Corporation; Hennepin County District Court; Stanley Kane as District Court Judge for the Hennepin County District Court; Gary Flakne, as County Attorney for the County of Hennepin; and Warren Spannaus as Attorney General of the State of Minnesota,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

Submitted: April 24, 1978

Filed: May 3, 1978

Before GIBSON, Chief Judge, VOGEL, Senior Circuit Judge, and HENLEY, Circuit Judge.

VOGEL, Senior Circuit Judge.

Appellants D. Alwyn Stivers and Walter B. Cherry appeal the order of a three-judge district court dismissing their amended complaint.

We briefly summarize the history of the case. On March 16, 1974, the Minnesota State Bar Association (Bar Association) filed a suit in Minnesota district court against Charles T. and Donna Thibodeau, Divorce Education Associates, Inc., and various"John Does". [1] The Bar Association sought to enjoin the defendants from engaging in the unauthorized practice of law in violation of Minn. Stat. 481.02 (1976), and to compel the repayment of all monies received for legal counselling.

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1. The various "John Does" made no appearance in the action and were apparently not served with process.

The defendants defended, inter alia, on the ground that 481.02 was unconstitutional. The Bar Association subsequently attempted to amend its complaint to include Divorce Education Association, an entity which was apparently separate from the named defendant Divorce Education Associates, Inc., but the court held that Divorce Education Association was not amenable to suit. [2]

On October 29, 1975, while the state court action was pending, the Thibodeaus and appellants Stivers and Cherry filed an action in federal district court [3] against the Bar Association, the state

2. The Bar Association also initiated a separate action against Divorce Education Association, but the action was dismissed on the ground that the latter was not amenable to suit.

3. After all of the judges in the district of Minnesota disqualified themselves because of their membership in the Minnesota State Bar Association, the action was assigned to the Honorable Edward J. McManus,

district court and district court judge, the State of Minnesota, the Attorney General of the State of Minnesota, and the Hennepin County Attorney. The complaint alleged, inter alia , that the plaintiffs were members of Divorce Education Association and that the action pending in the state court threatened the plaintiffs' continued involvement in that Association in deprivation of their constitutional rights. The action sought a temporary restraining order against the state proceedings, a declaration that 481.02 was unconstitutional, an injunction against its enforcement, and damages.

On December 10, 1975, the federal district judge denied plaintiffs' request for a temporary restraining order and requested that a three-judge panel be convened pursuant to 28 U.S.C. 2284 (1970) (amended 1976). The three-judge

court was convened on December 22, 1975.[4]

The state court trial commenced on January 5, 1976, before District Court Judge Stanley Kane. The trial concluded on February 10, 1976, and on May 12, 1976, Judge Kane issued his decision concluding that 481.02 was constitutional, and finding that the defendants had engaged in the unauthorized practice of law. In a detailed order, Judge Kane enjoined the defendants from engaging further in the

3.(cont'd) Chief Judge, United States District Court, Northern District of Iowa.

4. The three-judge court ultimately consisted of Judge McManus and Judges Myron H. Bright and Roy L. Stephenson of the United States Court of Appeals for the Eighth Circuit.

activity found to constitute unauthorized practice. Judge Kane also enjoined certain activities of Divorce Education Association, although the latter was not a party to the suit. [5] The Bar Association's request for reimbursement of legal fees was denied. A timely appeal was taken by the defendants from this decision to the Supreme Court of Minnesota. The Supreme Court of Minnesota subsequently dismissed the appeal for lack of prosecution.

---

5. Judge Kane enjoined advertising by Divorce Education Association through its representatives Charles T. and Donna Thibodeau on the theory that the Thibodeaus represented the Association and aired all of its diverse interests in defending the action.

After the state district court decision was filed, the federal court plaintiffs below sought to amend their complaint to add allegations of conspiracy under 42 U.S.C. 1985 (3) (1970) and bad faith prosecution, and to request that Judge Kane's order be enjoined and set aside. On September 9, 1976, the three-judge district court, in a well-reasoned opinion, issued an order (1) granting the plaintiffs' motion to amend, and (2) dismissing the complaint as amended. Thibodeau v. State of Minnesota, 419 F. Supp. 87 (D. Minn. 1976) vacated for a new order sub nom., Stivers v. Minnesota, 97 S. Ct. 1090 (1977). The court noted that Judge Kane had given consideration to all of the constitutional arguments urged by the plaintiffs in the federal action and had ruled adversely to them on each point. The dismissal was grounded on the principles of

federalism and comity set forth by the Supreme Court in Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); and Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). [6] Stivers and Cherry appeal the order of dismissal.[7]

6. Younger and Samuels established that when a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time the federal complaint is filed, principles of equity, comity, and federalism preclude federal injunctive or declaratory relief against the challenged statute unless bad faith enforcement or other special circumstances are demonstrated. In Huffman, the Supreme Cpurt determined that Younger principles applied to state proceedings which, although not strictly criminal in nature, were in aid of or closely related to the state's criminal statutes and sought to protect the interests underlying its criminal laws.

7. Stivers and Cherry initially filed an appeal with the United States Supreme Court. On February 22, 1977, the Supreme Court remanded the cause to the district court for the entry of a new order from which a timely appeal could be taken to this court, citing MTM, Inc. v. Baxley, 420 U.S. 799 (1975). Stivers v. Minnesota, 97 S.Ct. 1090 (1977).

As we read their brief, appellants, who are appealing pro se, contend that the three-judge district court erred in applying Younger principles to them because they were not named parties in the state court action. They also argue that state court remedies have been exhausted and that the principles of comity and federalism no longer apply. We reject both arguments and affirm.

Ordinarily, persons not subject to ongoing state proceedings may seek declaratory relief, Steffel v. Thompson, 415 U.S.452 (1974), or a preliminary injunction, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), in federal district court against the threatened enforcement of an allegedly unconstitutional state statute without meeting the requirements of Younger . However, the Supreme Court has indicated that in some circumstances

the comity considerations of Younger will apply to parties seeking relief in federal court, even though no state proceedings are pending against them by name. Hicks v. Miranda 422 U.S. 322, 348-49 (1975); Allee v. Medrano, 416 U.S. 802, 831 (1974) (Burger, C.J., concurring). Such a case may arise where the interests of the parties seeking relief in federal court are closely related to those of parties in pending state proceedings and where the federal action seeks to interfere with pending state proceedings. Hicks v. Miranda, supra. But cf. Doran v. Salem Inn, Inc., supra (where three corporations had similar business activities but were unrelated in terms of ownership, control and management, state proceedings against one of the corporations did not bar the other two corporations from seeking preliminary injunctive relief in federal court).

Before the three-judge district court, appellants made no attempt to distinguish their interests from those of their co-plaintiffs, the Thibodeaus, who were state court parties.[8] Rather appellants' pleadings indicate that their interests and the interests of the Thibodeaus are closely intertwined. They alleged that they are co-members with the Thibodeaus in Divorce Education Association; appellant Stivers and Donna Thibodeau are on the board of directors, and appellant Cherry and Charles T. Thibodeau are employees of the Association. The only standing to challenge 481.02 demonstrated by appellants arises from the alleged impact that

8. In responding to the defendants-appellees motions for dismissal, appellants and the Thibodeaus pursued the theory that they should come under the "extraordinary circumstances" exception to the Younger bar. Younger v. Harris, 401 U.S. 37, 45 (1971).

Judge Kane's injunction issued against the Thibodeaus, and Divorce Education Association, will have on appellants as members of the Association. Further, appellants sought by their federal action to interfere with the state proceedings; they requested a stay of the state proceedings in their original complaint, and a temporary and permanent injunction against Judge Kane's order in their amended complaint. Under these circumstances, the three-judge district court correctly applied the principles of Younger to appellants, even though they were not named as parties in the state proceedings.

The appellants' second contention is that state court remedies have now been exhausted and that therefore the principles of comity and federalism which barred the district court from considering the case no longer exist. In support of their argument, they attach to their brief a

photocopy of the Minnesota Supreme Court order dated May 11, 1977, dismissing the state court appeal for lack of prosecution. [9] They request that we remand the cause to the three-judge district court for proceedings on the merits.

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9. We would ordinarily not consider this claim on appeal as it was not before the district court. See Wilson v. United States 554 F. 2d. 893,894 (8th Cir. 1977), cert. denied, ____ U.S. ; Morrow v. Greyhound Lines, INC., 341 F. 2d. 713, 724 (8th Cir. 1976). The procedure available to the appellants to test this claim would be under Federal Rules of Civil Procedure 15(d) and 60 (b) . However, the appellees concede in their brief the facts necessary to decide the question posed and we think no useful purpose would be served by subjecting the appellants to the additional time and expense of proceeding in federal district court to determine it.

In Huffman v. Pursue, Ltd., supra, 420 U.S. at 609, the Supreme Court stated:

> Federal post-trial intervention in a fashion designed to annul the results of a state trial, ... deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction ....
>
> **********
>
> (W)e do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts. We therefore hold that Younger standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies.

The Supreme Court also indicated that parties involved in state proceedings may not avoid the standards of Younger by failing to comply with the procedures of perfecting an appeal within the state judicial system. Id. 611 n. 22 .

But cf. Wooley v. Maynard, 97 S. Ct. 1428 (1977) (where relief sought was wholly prospective, and federal suit was in no way designed to annul the results of a state trial, fact that party had not appealed state convictions did not bar federal court from granting preliminary injunctive relief). Although appellants were not named as parties in the state proceedings, they share an identity of interests with the state court parties and sought identical relief. We think that the principles set forth in Huffman v. Pursue, Ltd., supra, and discussed by the three-judge district court in its opinion, 419 F. Supp. at 90, militate against allowing appellants to avoid the Younger bar through the failure of their co-plaintiffs to prosecute an appeal within the state court system. Therefore, we decline appellants' request for remand.

Affirmed. A true copy. Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT